Myths, Realities, and Investigations under the Fair Labor Standards Act

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FLSA Myths

- Our Employees Would Never Sue Us
- We’re All Professionals
- We’re a Team
- We’re on the Honor System
FLSA Basics

- Sets out the requirements for minimum wage
- Overtime Pay
- Equal Pay
- Record Keeping
- Child labor standards

Exempt or Nonexempt?
(That is the question)

- Exempt employees do not earn overtime for work over 40 hours in a pay period.
- Non-Exempt employees earn overtime for work over 40 hours in a pay period.
Myth # 1: FLSA is comparable to collective bargaining agreements

► FLSA Does Not Require:
  ► Premium pay for weekends or holidays
  ► Paid time off or vacation time
  ► Discharge notices or severance

Myth # 2: Employers Must Provide Breaks

► Not Required by Law but....
► Traditionally are provided and employers compensate (5-20 minutes)
► Lunch Breaks – not compensable if employee is truly free from work duties
Myth #3: Employers Can Just Say “No” to Nursing Mothers

- Must provide “reasonable” break time for *non-exempt* employee to express milk each time such employee has the need to express milk.
- Must provide a place, other than the bathroom, that is shielded from co-workers and the public.

Myth #3 Continued

- The frequency of breaks employee needs to express milk and the duration of each break will likely vary.
- Breaks are not compensable unless employer compensates other employees for breaks.
Myth #3 Continued

- FLSA does not require breaks for exempt employees to express milk.
- Remember exempt employees have greater flexibility with hours of work.

Myth #4: Overtime Pay is the Same Rate as Regular Pay

- Overtime is paid at one and one-half times the regular hours or wage for each hour worked over 40 hours in a work week.
- Cannot lower pay for overtime.
Myth #5: Exempt Employee may not ever be paid more than normal salary

- Are not paid overtime for work over 40 hours in a pay period.
- May be compensated for work in addition to regular job duties.

Myth #6: Paid Leave Affects Overtime Calculations

- Paid leave such as vacation and holidays are not compensable leave for overtime calculations.
Myth # 6: Example

- Employee is out for 2 days (16 hours) and works 30 hours for rest of week.
- Employee wants credit for 46 hours for the work week because of the paid sick leave. 40 regular and 6 overtime.
- Leave time is not compensable time.

Myth #7: Compensatory Time is Use It or Lose It

- Compensatory time is a substitute for paid overtime.
- Do not use it or lose it.
- *E.g.* Employee has 60 hours of comp time on books when employment ends. The 60 hours must be converted to salary and paid.
More About Comp Time

- Employer can require comp time be taken before paid leave.
- Employer should set reasonable time comp time should be taken (before being converted to paid leave).
- Policy should state that comp time will be used. DEA (Local).

Comp Time vs. Flex Time

- Flex time is not overtime.
- *E.g.* Non-exempt employee stays over 1 hour in a work week but comes in later one hour in that same work week.
- Flex time not required but most employers allow some flexibility in the same work week.
Myth #8: All Training Time is Compensable Time

► If training time is required then training is compensable time for OT purposes.
► Volunteer training is not compensable time.

Myth #9: Travel Time is Compensable

► Time used to come and leave work is not compensable time for OT purposes.
► Travel time within the work duties is compensable time for OT purposes.
Myth # 10: Employees are Paid for Overnight Trips

▶ Non-exempt employees on business related trips are compensated for time that the employee is not free from all work duties for the day.

▶ *E.g.* Bus driver drives debate team to UIL activity in another city. Once driving duties are over, employee is free from work duties.

Myth # 11: Employees Can Waive Their Rights to Overtime

▶ *NO!*

▶ Employee volunteers to take work home and says “Don’t worry, you don’t need to consider this time as work time.”
Myth # 12: Non-Exempt Employees Can Never Volunteer
   - Employee/Parents Can Volunteer in Activities Directly Related to Their Child.
   - Volunteers: Those individuals who perform work for the school without a promise, expectation, or receipt of compensation.

Myth # 12 Continued
   - FLSA does not consider volunteers as employees
     - No $$ compensation
     - Can be paid expenses
     - Not the same work as the employee performs for the district
Myth # 12 Continued

- Employees can act as pure volunteers, but be careful.
- Employees cannot volunteer to do their own work.

Myth # 13: Unauthorized Overtime is not Compensable

- **WRONG!**
- If an employee works unauthorized overtime, pay the employee and deal with the personnel matter. Not paying overtime owed is not an option.
Myth # 14: Overtime can be paid out over 12 months, like salary.

- Districts are allowed to pay employees over a 12 month period for the convenience of the employee and the District BUT overtime owed must be paid in the pay period in which the Overtime was earned.

Myth # 15: To avoid paying OT, just classify EEs as Independent Contractors

- If employee is wrongly classified as an Independent Contractor, the employer just traded an overtime issue with the Department of Labor to a wrongful classification with the Internal Revenue Service. SEEK COUNSEL on an IC’s classifications.
Investigations under the Fair Labor Standards Act

Department of Labor’s Authority

- The Department of Labor has the authority to investigate and gather data concerning wages, hours, and other employment practices of the employer.

- Agents of the Department of Labor can question employees, and enter and inspect the employer’s premises and records in search of a violation of the Fair Labor Standards Act.
Why are we being investigated?

- Investigations can be triggered by:
  - Random Audit (possibly industry based); or
  - Individual complaints.

Investigation Basics – Investigator’s preliminary steps

- Make initial contact with the employer.
- Inform employer of the investigation and its scope.
- Obtain information from employer such as:
  - Name of employer;
  - Officers of employer;
  - Address of employer;
  - Federal tax identification number (EIN); and
  - Information on employer (such as size, volume, etc.).
Investigation Basics – Fact Finding

- In a typical investigation, the investigator will undertake the following fact finding steps:
  - Examine payroll records;
  - Conduct private employee interviews to test the accuracy of the records and assist in the evaluation of the claim; and
  - Present findings to employer

Concluding an Investigation

- If no violations were found, employer will be informed.
- If violations are found, the employer will be informed of the violations and ways to correct the violations.
Things to remember about investigations

- Employers may be represented by legal counsel at any point during the investigation process.
- Investigations can lead to litigation.

How can an investigation turn into litigation?

- Lawsuits may be initiated under the Fair Labor Standards Act by:
  - The Department of Labor;
  - Current Employees; or
  - Former Employees.
Common Claims

- Misclassification of a group of employees thus failing to pay overtime compensation; and
- Non-exempt employees not being properly compensated for all hours worked.
- Retaliation after filing a wage complaint with the Department of Labor, filing a grievance with the District, participating in an investigation, or other “protected activity.”

A Burden Shifting Framework

- Initial burden on employee to provide evidence that he/she was not properly compensated;
- Burden shifts to employer to provide evidence negating employee’s evidence.
Wal-Mart Stores, Inc. v. Dukes

- Plaintiffs argued that local decision maker’s decision to violate the requirements of the Act established a companywide disregard for the law.
- The Court held that illegal actions of one manager do not necessarily suggest companywide violations.

Possible Damages under the Act

- **Back Pay**: An employer is generally liable for up to two years of unpaid back pay, representing time and a half value for each hour of overtime.
  - If the court finds a willful violation of the Act, the court is authorized to award up to three years of back wages for overtime.
Possible Damages under the Act

- **Liquidated Damages:** the court is authorized to award damages to the employee of double the amount of back pay that is owed if employee can show a willful violation.

- **Civil Penalties:** fines of up to $1,100 per violation can be levied on employers depending upon the nature and severity of the violation.

- **Attorneys’ Fees:** the court is authorized to award a successful Plaintiff attorneys’ fees.

Settlements under the Act

- Unless a litigation settlement has been approved by a court, the Department of Labor only recognizes those settlements in which it has been involved and for which it has issued approval.

- The Department of Labor approval of a settlement is evidenced by the Department of Labor’s settlement form.
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